BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CODY D. CROOK	)	
Claimant	)	
V.	)	
	)	
H2 TRUCKING, LLC	)	Docket No. 1,065,380
Respondent	)	
AND	)	
	)	
TRAVELERS CASUALTY & SURETY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the August 2, 2013 preliminary hearing Order. Matthew Bretz of Hutchinson, Kansas, appeared for claimant. Ali Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The preliminary hearing Order indicated claimant was an employee of respondent and that while there was a safety rule in place, it was not enforced by respondent at the job site. Temporary total disability (TTD) and medical benefits were ordered.

The appeal record is the same as that considered by the administrative law judge and consists of the July 17, 2013 preliminary hearing transcript and exhibits thereto, claimant's July 2, 2013 deposition transcript, and all pleadings in the administrative file.

ISSUES

Claimant was run over by a Mack truck on March 18, 2013. Respondent argues the claim is barred because claimant was an independent contractor, not an employee or worker, or alternatively, claimant recklessly violated respondent's safety rules or regulations, pursuant to K.S.A. 44-501(a)(1)(D).

Claimant argues that whether he violated respondent's safety rules is not a proper issue for appeal from the preliminary hearing Order. Claimant maintains the preliminary hearing Order should be affirmed.

The issues for the Board's review are:

1. Was claimant an employee or independent contractor?

2. Did claimant recklessly violate respondent's workplace safety rules or regulations, pursuant to K.S.A. 44-501(a)(1)(D)?

FINDINGS OF FACT

Respondent's business involved setting up and taking down oil rigs and moving them to different locations. After filling out an employment application and taking a drug test, claimant began working for respondent as a swamper on March 6, 2013. His job involved going from location to location with a truck driver. He would hook up pieces of oil rig equipment to line on a winch; such pieces would be winched to the truck. He would later unhook the equipment from the truck. Use of swampers allowed respondent's truck drivers to stay in their trucks. Claimant never previously worked as a swamper.

On March 18, 2013, claimant was working in or near Macksville, Kansas. Claimant was riding on a step located outside the passenger side of a flatbed Mack truck that was being pushed up a hill backwards out of deep sand by a Caterpillar bulldozer.[1] Absent using the bulldozer to push the truck, the truck would get stuck in the sand. Claimant was riding on the outside of the truck while holding a handle or bar on the truck. A driver was inside the truck. The truck hit a hole or rut in the road, causing claimant to lose his footing and fall face down on the ground. The truck ran over the back of claimant's thighs. Claimant was taken to Great Bend by ambulance before being air lifted to Wesley Medical Center in Wichita. Claimant underwent two surgical debridement procedures as well as a skin graft procedure on his left thigh.

Employee v. Independent Contractor

Shelly DeWald, respondent's trucking manager, testified claimant was hired as a contract labor swamper. He was paid by the hour on a weekly basis, taxes were not taken out of his paycheck, and he was not entitled to fringe benefits or overtime. When claimant started working for respondent, Ms. DeWald explained to him the nature of his employment and had him execute a "Liability Waiver" and "Worker's Compensation Waiver."[2] Ms. DeWald acknowledged that claimant completed an employment application, was trained by respondent and provided instruction on where to go and what time to show up, and that respondent had the right to say whether it wanted claimant to continue working for them.

Respondent supplied claimant with a hard hat, safety goggles and gloves. Claimant did not provide any tools. He had no employees working for him. According to claimant, respondent told him when, where and how to work. Claimant did not have the latitude on how or when to work for respondent, noting that respondent had complete authority to tell him how to work. Claimant testified respondent hired him and had the right to fire him. Claimant only worked as a swamper for respondent, but not for any other employers.

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[1] Claimant described the sand at the location as so deep that when he walked, it covered his feet and either covered his ankles or went halfway up his calves. (P.H. Trans. at 9; Claimant's Depo. at 26).

[2] P.H. Trans., Resp. Ex. A at 1-2.

Claimant testified that he considered himself an employee because he completed an employment application, respondent provided him with the training and equipment needed for working, respondent instructed him on where to be and what time to show up, and respondent had the authority to reprimand and/or fire him, as well as the fact that he was working "just as many hours as everybody else."[3]

Reckless Violation of Safety Rules

Ms. DeWald testified that respondent must prove to the Department of Transportation that it follows safety rules and regulations. Respondent held monthly safety meetings and had each worker sign a "Safety Objectives" form[4] on a daily basis. One of the objectives listed on the form reads: "No one is allowed to ride on a moving vehicle unless inside the cab."[5] Ms. DeWald testified this form was explained to claimant on his first day and was read out loud "once in a while, or once a week, possibly" by the truck pusher. Ms. DeWald indicated it was very dangerous for people to ride on the outside of trucks because the terrain involved is highly variable and truck drivers have little control over their vehicles when pushed around by bulldozers. When questioned whether the rule prohibiting anyone from riding on the outside of trucks was enforced, Ms. DeWald testified:

> A. I believe it is.
>
> Q. Do you do anything to enforce that rule ever?
>
> A. Well, when I have the safety meetings, I always address that.
>
> I go out on locations. I flag for the derrick and the sub, and if I've ever seen – I have seen, but they have been corrected, they have been written up, it's just not tolerated.[6]

Ms. DeWald identified two situations where she observed a swamper riding on the outside of a truck and she "took care of it."[7] Ms. DeWald testified she was not in the field when claimant was working, so she never observed him riding on the side of a truck. She acknowledged claimant was never reprimanded for a safety violation. She did not know whether claimant was ever told that he was supposed to ride on the outside of respondent's trucks.

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[3] Claimant's Discovery Depo. at 41-42.

[4] P.H. Trans., Resp. Ex. C.

[5] *Id.*

[6] P.H. Trans. at 23-24.

[7] *Id.* at 27.

Claimant testified he was told to ride on the side of the truck by the lead swamper, Christian Wirth,[8] as it was the fastest and easiest way to do the job. Claimant indicated he rode on the side of the truck "all the whole time we were doing the job" and for "any job" he worked as a swamper.[9] He testified this method was used for each load, which was approximately 20-30 times a day. He testified all the swampers, each and every one, rode on trucks this way, as he was taught, trained and instructed to do by Mr. Wirth, and the only time he was told not to ride on the side of the truck was when someone from OSHA was around.[10] Claimant further testified that he did the job, including riding on the outside of the truck, based on how he saw other swampers doing their work.

Claimant also testified that he was riding on the truck because the location between the equipment and a drill site was about one-quarter mile and it would not make sense to run back and forth. He further indicated he could not ride in the truck because the cabs were small and the driver would not be able to see around him while operating the truck.

While claimant signed the "Safety Objectives" form each day, he denied ever reading it and simply signed what he was told to sign. He testified that nobody ever discussed that workers were not allowed to ride on a moving vehicle except inside the cab.

Claimant testified the truck driver knew he was riding on the side of the truck. An "Incident Report" completed by the driver, Roy E. Guy, III, indicated he never saw claimant until after he ran over him. The report contained Mr. Guy's belief that claimant apparently tried to jump onto the truck passenger side step, but fell off. Claimant denied trying to jump on or off the truck just prior to the accident. Mr. Guy did not testify.

Claimant did not return to work and is under medical care. He has left leg numbness. He can walk without assistive devices.

The preliminary hearing Order stated:

> The court finds the testimony of both the claimant and Miss Dewald entirely credible and consistent. The court finds that on the day of claimant's accident, the practice of swampers riding on the side of trucks to save time was routinely engaged in, and that the claimant was instructed to perform his job in this way at the work site. The court further finds that while there was a safety rule in place, it was not enforced at the job site. The court notes that Miss Dewald was never present when claimant was working at a job site. (Preliminary Hearing p.29)

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[8] Ms. DeWald testified that Mr. Wirth, who she identified as a full-time *employee* and swamper, was terminated for not showing up on time, taking rules into his own hands and doing things that he was not to do. (P.H. Trans. at 28-29). Mr. Wirth did not testify.

[9] Claimant's Discovery Depo. at 27.

[10] *Id.* at 38, 43-45, see also P.H. Trans. at 11,14-16.

The court orders respondent to pay TTD from March 18, 2013 through July 13, 2013 based on the compensation rate of $478.02. The court further orders the medical bills contained in claimant's exhibit 1 be paid as authorized medical pursuant to the fee schedule. Respondent is to provide a list of two physicians from which claimant is to choose an authorized treating physician.

Respondent timely appealed.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-501(a)(1)(D) states:

Compensation for an injury shall be disallowed if such injury to the employee results from the employee's reckless violation of their employer's workplace safety rules or regulations.

K.A.R. 51-20-1 states:

The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.[11]

K.S.A. 44-505(a) states:

Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees.

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[11] An administrative regulation has the force and effect of law, if it is not inconsistent with a statute. *Barbury v. Duckwall Alco Stores, Inc.*, 42 Kan. App. 2d 693, 694, 215 P.3d 643, 644 (2009)

K.S.A. 2012 Supp. 44-508(b) states:

> "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. . . . Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.

K.A.R. 51-21-1 provides that a "worker, under the act, cannot contract with the employer to relieve the latter of liability in case of an accident."

It is often difficult to determine in a given claim whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[12]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[13] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[14]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[15]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

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[12] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[13] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[14] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 337, 510 P.2d 1274 (1973).

[15] *Wallis* at 102-03.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[16]

ANALYSIS

Notwithstanding the "Liability Waiver," the "Worker's Compensation Waiver" and the fact that taxes were not taken out of claimant's pay, the overall conduct of the parties and the facts of this case illustrate that claimant was respondent's employee, not an independent contractor. Claimant was under respondent's control. He had to complete a job application and take a drug test. He was doing respondent's work. He was told when, where and how to work. He was unable to control the pace of the work or set his own hours. While perhaps a semantic battle between "terminating" claimant versus just "not calling him back" to work, respondent had the right to discharge him. Claimant was paid by the hour, not by the job. He did not operate an independent business. Rather, he was only doing respondent's work and he did not work for any other employers. Claimant did not employ assistants. He provided no tools, supplies or materials. Respondent provided some safety gear and transportation to and from work sites.

Giving some deference to the administrative law judge's first-hand opportunity to assess claimant's credibility, this Board Member concludes that while there was a safety rule, it was not rigidly enforced. In fact, the current evidence supports claimant's assertion that the rule was ignored: swampers were instructed to ride on the outside of trucks, unless an OSHA representative was present. Claimant did not recklessly violate a safety rule; he was doing the job as directed.

CONCLUSIONS

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the August 2, 2013 preliminary hearing Order is affirmed.[17]

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[16] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

[17] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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